

Department of Business and Professional Regulation
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STATE OF FLORIDA
DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION
DIVISION OF FLORIDA LAND SALES, CONDOMINIUMS, AND
MOBILE HOMES

DS 2005-055

IN RE PETITION FOR DECLARATORY STATEMENT

Docket No. 2005059934

Plaza East Association, Inc.

DECLARATORY STATEMENT

Plaza East Association, Inc. (Plaza East), Petitioner, filed a Petition for Declaratory Statement requesting an opinion as to whether Plaza East Association, Inc., which is required to insure the condominium property located outside the units, the property located inside the units as initially installed, and all portions of the condominium property requiring coverage by the association under section 718.111(11)(a), Florida Statutes (2003), may pass on to the unit owner the cost of repairing those items that would have otherwise been paid for by the association's insurance policy but for the application of the deductible or amounts in excess of the coverage limits, notwithstanding provisions in the declaration defining the condominium property as part of a unit with the cost of repairs to be paid for by the unit owner.

PRELIMINARY STATEMENT

On November 9, 2005, the Division received a petition for declaratory statement from Plaza East. Notice of receipt of the petition was published in

Florida Administrative Weekly on December 9, 2005. A hearing was not requested or held.

FINDINGS OF FACT

The following findings of fact are based on information submitted by Plaza East. The Division takes no position as to the accuracy of the facts, but merely accepts them as submitted for purposes of this final order.

1. Plaza East Condominium was created in November 1967 by recording of its declaration of condominium in the public records of Broward County, Florida at OR 3546 BK 150. Declaration of Condo. Plaza East at 1.
2. The declaration of condominium provides that the lands comprising Plaza East are submitted to "the condominium form of ownership and use in the manner provided by Chapter 711, Florida Statutes 1963 as amended." Art. I, Declaration at 1.
3. Common expenses include the cost of "maintenance, operation, repair or replacement of the common elements, and of the portions of apartments to be maintained by the association." Art. II, § E, Declaration at 2; Art. III(A), By-laws of Plaza East Ass'n, Inc. (power to assess for expenses). Insurance premiums, which include a deductible, are a common expense. Art. VIII(C), Amendment to Declaration (May 29, 2003).
4. The condominium has 266 units. Art. III, § E(1), Declaration at 4.
5. Unit owners are members of the association, own a percentage share of the common elements and funds and assets held by the association,

and are liable for a proportionate share of the common expenses. Art. IV, §§ C, D, Art. VI, Declaration at 5-10, 12-13.

6. Under the general maintenance obligations, the association must maintain and repair: (1) all portions of the units, except interior surfaces, contributing to the support of the building, which includes the outside walls and fixtures, the boundary walls, floor and ceiling slabs, and load-bearing columns and walls; (2) all plumbing, utility and electrical components; and (3) any damage to the units caused by work done on these sections by the association. Art. V, § A(1), Declaration at 10-11.

7. Under the general maintenance obligations, a unit owner must maintain and repair "all portions of his apartment except the portions to be maintained, repaired and replaced by the Association." Art. V, § A(2), Declaration at 11. Under article IX, section C, of the original declaration, the association shifts the responsibility for repairs to the unit owner if only one unit is damaged.¹

8. Under article IX, section E, of the declaration as originally recorded, "[i]f the proceeds of such assessments and of the insurance are not sufficient to defray the estimated costs of reconstruction and repair by the Association, or if at any time during reconstruction and repair, or upon completion of reconstruction and repair, the funds for the payment of the costs of reconstruction and repair are insufficient, assessments shall be made against the apartment owners who own the damaged apartments, and against the apartment owners in the case of

¹ Article IX, Reconstruction and Repair After Casualty, was not amended, but the provisions of article VIII, Insurance, which was amended, provides for reconstruction and repair after casualty.

damage to common elements, in sufficient amounts to provide funds for the payment of such costs.”²

9. The association interprets these provisions to require unit owners to maintain, repair and replace the unit’s windows, doors and screened enclosures. Pet. Dec. Stmt.

10. The association must use its best efforts to obtain and maintain adequate insurance to protect the association, the association property, the common elements and the condominium property required to be insured by the Association. Amendment to Art. VIII, § A, Declaration (May 29, 2003); Art. 3(d), Art. of Incorpor. The association is agent for the unit owners and their mortgagees under the insurance contract. Id. All payments on insurance claims are made to the association. Id.

11. Unit owners “may obtain insurance coverage at their own expense upon their own personal property and for their personal liability and living expense.” Art. VIII, Declaration at 14.

12. Association casualty insurance must provide:

B. Coverage.

1. Casualty. All buildings and improvements upon the land shall be insured in a maximum amount recommended and recognized by the insuring company or companies which will provide practical and adequate coverage in the event of a potential loss. This insurance coverage will exclude foundation and excavation costs but will include the value of all personal property in the common elements, all as determined by the Board of Directors of the Association.

² Article IX was not amended and still refers to an insurance trustee for execution of its provisions. The amendment to article VIII repealed all reference to the insurance trustee and its powers and duties. Article VIII makes the association responsible for all matters relating to insurance and reconstruction and repair. Amended art. VIII, Declaration.

The word "building" wherever used in the policy shall include, but not necessarily be limited to, fixtures, installations, or additions comprising that part of the building within the unfinished interior surfaces of the perimeter walls, floors, and ceilings of the individual units initially installed, or replacements thereof of like kind or quality, in accordance with the original plans and specifications, or as they existed at the time the unit was initially conveyed if the original plans and specifications are not available. The word "building" shall not include unit floor coverings, wall coverings, or ceiling coverings, and shall not include the following equipment if it is located within a unit and the unit owner is required to repair or replace such equipment: electrical fixtures, appliances, air conditioner or heating equipment, water heaters, or built-in cabinets. With respect to the coverage provided for by this paragraph, the unit owners shall be considered additional insureds under the policy. Such coverage shall afford protection against:

- (a) Loss or damage by fire and other hazards covered by a standard extended coverage endorsement, and
- (b) Such other risks as from time to time shall be customarily covered with respect to buildings similar in construction, location and use as the buildings on the land, including, but not limited to vandalism and malicious mischief, except that the Association may, but shall not be required to, maintain "terrorism insurance."

Amendment to Art. VIII, § B, Declaration (May 29, 2003).

13. Insurance proceeds are distributed as follows:

D. Shares of proceeds. All insurance policies purchased by the Association shall be for the benefit of the Association and the apartment owners and their mortgagees as their interests may appear, and shall provide that all proceeds covering property losses shall be paid to the Association. The duty of the Association shall be to receive such proceeds as are paid and hold the same in trust for the purposes elsewhere stated herein and for the benefit of the apartment owners and their mortgagees in the following shares:

1. Common Elements. Proceeds on account of damage to common elements – an undivided share for each apartment owner, such share being the same as the undivided share in the common elements appurtenant to his apartment.

2. Apartments. Proceeds on account of damage to apartments shall be held in the following undivided shares:

(a) When the building is to be restored – for the owners of damaged apartments in proportion to the cost of repairing the damage suffered by each apartment owner, which cost shall be determined by the Association.

(b) When the building is not to be restored – An undivided share for each apartment owner, such share being the same as the undivided share in the common elements appurtenant to his apartment.

* * * *

E. Distribution of proceeds. Proceeds of insurance policies received by the Association shall be distributed to or for the benefit of the beneficial owners in the following manner:

1. Expense of the trust. All expenses of the Association shall be first paid or provision therefore.

2. Reconstruction or repair. If the damage for which the proceeds are paid is to be repaired or reconstructed, the remaining proceeds shall be paid to defray the cost thereof as elsewhere provided. Any proceeds remaining after defraying such costs shall be distributed to the beneficial owners, remittance to apartment owners and their mortgagees being payable jointly to them. This is a covenant for the benefit of any mortgagee of an apartment and may be enforced by such mortgagee.

3. Failure to reconstruct or repair. If it is determined in the manner elsewhere provided that the damage for which the proceeds are paid shall not be reconstructed or repaired, the remaining proceeds shall be distributed to the beneficial owners, remittances to apartment owners and their mortgagees being payable jointly to them. This is a covenant for the benefit of any mortgagee of an apartment and may be enforced by such mortgagee.

F. Association as agent. The Association is hereby irrevocably appointed agent for each apartment owner and for each owner of a mortgage or other lien upon an apartment and for each owner of any other interest in the condominium property to adjust all claims arising under insurance policies purchased by the Association and to execute and deliver releases upon payment of claims.

Amendment Art. VIII, Declaration (May 29, 2003).

14. After an insurable event, the association must get estimates of the cost to rebuild the damaged sections. Amendment art. VIII, § D, Declaration. The association holds all the insurance proceeds in trust for unit owners and the mortgagees. Id. art. VIII(F).

15. If the proceeds are insufficient to pay for the cost of the repairs and if the funds are not available in the budgeted operational funds or reserve funds set aside for the specific purpose, then the association may pass with majority approval an emergency assessment. Art. VI, § E, By-laws at 86.

CONCLUSIONS OF LAW

16. The Division has jurisdiction to enter this order pursuant to sections 718.501 and 120.565, Florida Statutes.

17. Plaza East has standing to seek this declaratory statement.

18. If the damage is caused by an insurable event, the cost of the repairs is covered by section 718.111(11), Florida Statutes (2003), which controls over any provision to the contrary in a declaration of condominium.

I. The Condominium Act.

19. Section 718.111(11), Florida Statutes (2003), provides, in part, the following (emphasis added):

(11) INSURANCE.--In order to protect the safety, health, and welfare of the people of the State of Florida and to ensure consistency in the provision of insurance coverage to condominiums and their unit owners, paragraphs (b) and (c) are deemed to apply to every condominium in the state, regardless of the date of its declaration of condominium. It is the intent of the Legislature to encourage lower or stable insurance premiums for

associations described in this section. Therefore, the Legislature requires a report to be prepared by the Office of Insurance Regulation of the Department of Financial Services for publication 18 months from the effective date of this act, evaluating premium increases or decreases for associations, unit owner premium increases or decreases, recommended changes to better define common areas, or any other information the Office of Insurance Regulation deems appropriate.

(a) A unit-owner controlled association shall use its best efforts to obtain and maintain adequate insurance to protect the association, the association property, the common elements, and the condominium property required to be insured by the association pursuant to paragraph (b). . . . An association may also obtain and maintain ... flood insurance for common elements, association property, and units. Adequate insurance, regardless of any requirement in the declaration of condominium for coverage by the association for "full insurable value," "replacement cost," or the like, may include reasonable deductibles as determined by the board. An association or group of associations may self-insure against claims against the association, the association property, and the condominium property required to be insured by an association, upon compliance with ss. 624.460-624.488. A copy of each policy of insurance in effect shall be made available for inspection by unit owners at reasonable times.

(b) Every hazard insurance policy issued or renewed on or after January 1, 2004, to protect the condominium shall provide primary coverage for:

1. All portions of the condominium property located outside the units;

2. The condominium property located inside the units as such property was initially installed, or replacements thereof of like kind and quality and in accordance with the original plans and specifications or, if the original plans and specifications are not available, as they existed at the time the unit was initially conveyed; and

3. All portions of the condominium property for which the declaration of condominium requires coverage by the association.

Anything to the contrary notwithstanding, the terms "condominium property," "building," "improvements," "insurable improvements," "common elements," "association property," or any other term found in the declaration of condominium which defines the scope of property or casualty insurance that a condominium association

must obtain shall exclude all floor, wall, and ceiling coverings, electrical fixtures, appliances, air conditioner or heating equipment, water heaters, water filters, built-in cabinets and countertops, and window treatments, including curtains, drapes, blinds, hardware, and similar window treatment components, or replacements of any of the foregoing which are located within the boundaries of a unit and serve only one unit and all air conditioning compressors that service only an individual unit, whether or not located within the unit boundaries. The foregoing is intended to establish the property or casualty insuring responsibilities of the association and those of the individual unit owner and do not serve to broaden or extend the perils of coverage afforded by any insurance contract provided to the individual unit owner. Beginning January 1, 2004, the association shall have the authority to amend the declaration of condominium, without regard to any requirement for mortgagee approval of amendments affecting insurance requirements, to conform the declaration of condominium to the coverage requirements of this section.

(c) Every hazard insurance policy issued or renewed on or after January 1, 2004, to an individual unit owner shall provide that the coverage afforded by such policy is excess over the amount recoverable under any other policy covering the same property. Each insurance policy issued to an individual unit owner providing such coverage shall be without rights of subrogation against the condominium association that operates the condominium in which such unit owner's unit is located. All real or personal property located within the boundaries of the unit owner's unit which is excluded from the coverage to be provided by the association as set forth in paragraph (b) shall be insured by the individual unit owner.

See ch. 2003-14, § 4, Laws of Fla.

II. Legislative History.

20. The legislature intended to clarify what portions of the insurance and insurable expenses for the condominium were to be paid by the association and what portions were paid by an individual unit owner for hazard policies when it amended this section in 2003.³ Fla. H.R. Comm. on Jud., CS for HB 165 (2003)

³ Section 624.604, Florida Statutes (2004), defines "property insurance" as insuring real or personal property against any "hazard." The insurance law does not define hazard, but does list the following as hazards: "pollution and environmental hazards," "disease hazards," "fire hazards,"

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Staff Analysis 1, 9 (Mar. 20, 2003) (available on Florida Legislature website < <http://www.flsenate.gov/data/session/2003/House/bills/analysis/pdf/>>). This provision also appeared in CS for CS for SB592 in which it was presented as a clarification of “the property and casualty insuring responsibilities of the association provided . . .” that these responsibilities “do not affect any insurance contract provided to a unit owner.” Fla. Sen. Comm. on Jud., CS for CS for SB 592 (2003) Staff Analysis 10 (Apr. 15, 2003) (available on Florida Legislature website < <http://www.flsenate.gov/data/session/2003/Senate/bills/analysis/pdf/>>). The insurance amendment “supersedes certain coverage requirements for hazard insurance policies provided to the association, covering a condominium building, and requires, instead, that every policy issued or renewed on or after January 1, 2004 to provide primary coverage for the following: All portions of condominium property located outside the units; Condominium property located inside the units as initially installed or replaced with like kind and quality in accordance with original plans or, if those plans are not available, as they existed in the unit at the time of conveyance; and all portions of the condominium property required to be covered under the declaration.” *Id.* The bill expanded the list of items that could not to be covered under the association’s policy. These include items in the interior of the unit: water filters, countertops, and air

and “slip and fall hazards.” § 627.0625(3)(a), Fla. Stat. Cases have been found that use the term in reference to policies covering fire and hurricanes. *Public Fire Ins. Co. v. Crumpton*, 148 So. 537 (Fla. 1933) (fire); *Tench v. American Reliance Ins. Co.*, 671 So.2d 801 (Fla. 3d DCA 1996) (hurricane). “Hazard” is generally defined as “danger, peril,” “accident,” “a condition that tends to create or increase the possibility of loss,” “the effect of unpredictable, unplanned, and unanalyzable forces.” Webster’s 3d New Internat’l Dict. 1041. Traditionally, coverage of hazards under policies protect for damage caused by fire, wind, rain. *Pet. Dec. Stmt., Lake Maitland Terr. Apts., Inc.*, at 3, (Sept. 30, 1983) (denying petition as declaratory statement was not proper forum to determine liability under insurance policy for damage caused by water leak around soap dish).

conditioning compressors serving only one unit. Id. The items excluded from association coverage are covered under the unit owner's policy. Id. The amendment became effective on May 21, 2003. Ch. 2003-14, § 16, Laws of Fla.

21. A discussion on amendment 2 to House Bill 165, which added this provision to that bill, presented the insurance amendment as a clarification that the association insures all of the condominium building and improvements and a unit owner purchases what amounts to "renter's" insurance on the personal property and contents. Tape recoding of H.R. Comm. on Jud. (Mar. 5, 2003) (available at Fla. Dep't of State, Div. of Archives, ser. 414, carton 1413, Tallahassee, Fla.). The amendment was to ensure "fairness between condo[minium] associations and the unit owners." Id. (comments by Rep. Mack). The amendment provided for "reasonable deductibles" to be determined by the board. Id. (comments by R. Penske). If the damage to the building under the association policy falls below the deductible, the association must pay for it. Id.; see also Pet. for Dec. Stmt., The Renaissance of Pompano Beach II, DS89500 (May 23, 1990) (finding that unit owner was properly assessed as a common expense to pay deductible for damages to another owner's unit for a common element water leak).

22. Finally, the amendment repealed a provision grandfathering in declarations recorded before 1986 that required an association to insure portions of units that the unit owner was required to repair or replace. The repealed language is:

However, unless prior to October 1, 1986, the association is required by the declaration to provide coverage therefor, the word "building" does not include unit floor coverings, wall coverings, or ceiling coverings, and, as to contracts entered into after July 1, 1992, does not include the following equipment if it is located within a unit and the unit owner is required to repair or replace such equipment.

Ch. 2003-14, § 4, Laws of Fla. (unit owner coverage of floor, wall and ceiling coverings was moved to subsection 3, only the grandfathering language was repealed).

23. The legislature intended to make condominium property casualty insurance contracts uniform across the state and make it clear which items of the condominium property were the responsibility of the association to insure and which were the responsibility of the unit owner. Beginning January 1, 2004, all Florida condominium associations were responsible for adequately insuring for the replacement cost of the buildings, the components of the building structures, which includes the windows, doors, screens, and sliding glass doors that were initially installed when the building was built even where these are designated as inside the unit's boundaries. § 718.111(11)(a)-(c), Fla. Stat. But see Pet. Dec. Stmt. Bayway Isles-Point Brittany Two Condo. Corp. Inc., DS98-010 (May 22, 1998) (finding that under § 718.111(11), Fla. Stat. (1992) as applied to a 1969 condominium, the declaration and statute required unit owners to insure and replace the appliances).

24. The amendment also allowed associations that were required under their declarations to insure the property for full replacement value to

contract for a reasonable deductible. This would assist associations with lowering the cost of insurance.

25. Under the amendment, unit owner insurance is no longer an option, but an obligation. In making this change, the legislature correspondingly deleted reference to a unit owner's repair obligation. The items excluded from association coverage are covered under the unit owner's policy. Now, all repairs made after an insurable event are governed by the statute, declaration insurance provisions as amended by the statute, and insurance contracts.

26. Under insurance regulations, condominium associations purchase commercial residential property insurance and unit owners purchase personal residential property insurance. Fla. Off. of Ins. Reg., Condominium Insurance Report, at 1, (Nov. 19, 2004) (filed with the legislature in accordance with § 718.111(11), Fla. Stat.); § 627.4025, Fla. Stat. (2003).

III. Application of Amendment.

27. Plaza East amended the insurance provisions in its declaration on May 29, 2003. The amendment was recorded in the public records of Broward County on June 13, 2003. Amendment Art. VIII, Declaration. The amendment incorporates the amendment to section 718.111(11), Florida Statutes, which went into effect on May 21, 2003. Therefore, this section as amended applies to Plaza East. See Woodside Vill. Condo. Ass'n, Inc. v. Jahren, 806 So. 2d 452 (Fla.2002) (finding that the condominium act provides broad authority to unit owners to amend declaration with less than 100% vote to adopt leasing restrictions).

28. Associations have a duty to obtain adequate insurance and manage the insurance proceeds for the benefit of the unit owners. § 718.111(11), Fla. Stat.; Nat'l Title Ins. Co. v. Lakeshore 1 Condo. Ass'n, Inc., 691 So. 2d 1104 (Fla. 3d DCA 1997) (holding that the association had a duty to exercise reasonable care in managing insurance proceeds for the benefit of the unit owners and mortgagees). Unit owners were to insure the contents of the unit that were excluded from the association's policy. Id. § 718.111(11)(c). For example, window treatments are excluded from the association policy, so a unit owner insures the window treatments. Windows are not excluded from the association policy, so the association insures the windows.

29. The association asks whether in cases where the damage caused by an insurable event like a hurricane does not exceed the deductible under the association's insurance policy and it does not make a claim for insurance proceeds, if it or the individual unit owners under the terms of the declaration are responsible for the cost of the repairs.

30. The damage is caused by an insurable hazard covered by the insurance provisions of section 718.111(11), Florida Statutes, as to who is responsible for insuring for the replacement cost of the components. It is not a typical maintenance responsibility under article V of the declaration. The owner is obligated to maintain the windows and doors in good repair under the owner's usual wear and tear and general upkeep obligations. General maintenance is not an insurable property hazard. Therefore, article V of the declaration does not shift the burden of the cost of repairing the windows and doors to the unit owners

when these components have been damaged by a hurricane. To do so, would conflict with the legislature's intent to clearly apportion the responsibility for the cost of insuring and replacing those components damaged by a hurricane.

31. Article IX of the declaration, which was not amended, appears to shift the responsibility to the unit owner for repairs if the damage is to the portions of the unit that the unit owner is required to maintain under his general maintenance obligations. Art. IX(C), Declaration at 19. Because article VIII(E) of the declaration makes the association responsible for paying for repairs for the damage covered by insurance and it is the more recent provision, which incorporates the statutory language in the amendments made to section 718.111(11), Florida Statutes, it applies to the question raised. See Woodside Vill. Condo. Ass'n, Inc. v. Jahren, 806 So. 2d 452 (Fla. 2002) (finding that courts look to the statutory scheme as well as to the declaration and its amendments to determine the legal rights of the owners); Sans Souci v. Division of Fla. Land Sales and Condo., Dep't of Bus. Reg., 421 So. 2d 623, 628 (Fla. 1st DCA 1982) (date of filing declaration engrafts law in effect on date of filing into declaration); Hovnanian Fla., Inc. v. Div. of Fla. Land Sales and Condo., Dep't Bus. Reg., 401 So. 2d 851, 854 (Fla. 1st DCA 1981) (declaration provision governs until amended or terminated).

IV. Common Expense.

32. Insurance for the association is a common expense. §§ 718.111(11), 718.115, Fla. Stat.; accord art. IX, § E, Declaration. Insurance

proceeds are treated as revenue to the association and constitute common surplus. § 718.103(10), Fla. Stat.

33. An association is not required to insure 100% of the replacement cost of the condominium property, but must have adequate insurance to replace the property destroyed by a hurricane. The board may include reasonable deductibles in replacement value insurance policies. § 718.111(11)(a), Fla. Stat. A deductible amount is part of the cost of insurance and is a common expense for which reserves might be set aside. § 718.111(11), 718.115, Fla. Stat.; accord art. IX, § E, Declaration at 19. As such, an association may not shift the cost of an insurable common expense to an individual unit owner as common expenses must be assessed in the proportions or percentages required under sections 718.104(4)(f), 718.116(9), Florida Statutes.

34. Plaza East may not shift the cost of the deductible, a common expense, to only those unit owners whose windows were damaged by the insurable event such as a hurricane. Compare Brickell Town House Ass'n, Inc. v. Del Valle, Case No. 95-0133 (Arb. Final Order, Sept. 12, 1995) (holding that incidental and direct costs of repairing hurricane damage to common elements, which included unit owner damages, such as living expenses, furniture storage, moving expenses and lost income, was common expense). The owners with the damaged units paid their proportionate share of the insurance to replace those windows in the first instance. The association manages the insurance claims and proceeds as the agent for these owners under article VIII of the declaration. It must do so with reasonable care since the unit owners are prohibited from filing

a claim under the association's policy. Amended art. VIII, §§ D, F, Declaration; see Nat'l Title Ins. Co. v. Lakeshore 1 Condo. Ass'n, Inc., 691 So. 2d at 1108. Furthermore, under section 718.111(11), Florida Statutes, unit owners are no longer able to insure the structural components of the building, which includes the windows and doors. Therefore, shifting the risk and the liability to individual unit owners for these damages is unfair and inconsistent with the assignment of insurable risks determined by the legislature under section 718.111(11), Florida Statutes. To the extent the declaration is inconsistent with the statute as amended in 2003, the statute controls.

35. Under article VIII and section 718.111(11), Florida Statutes, unit owners must rely on their association to insure for property damages to unit windows and doors regardless of what the declaration may have provided. If damage is caused by an insurable hazard, unit owners must look to the association to file a claim for insurance. If the repair cost exceeds the amount of the deductible, an association will file a claim for the insurance proceeds and assess all unit owners for the deductible amount in order to have enough funds to reconstruct the damaged structure. The same applies when the repair cost does not exceed the deductible amount and no claim is made. If the association did not have a deductible but had full replacement cost, it would have made a claim and repaired the damage. So, the deductible is a cost of association insurance, which cannot be passed on to only a few unit owners.

V. Constitutional Issue.

36. There are two contracts affected by this amendment: (1) the declaration; and (2) the insurance contract(s). The amendment is prospective in

application as to the insurance contracts. By its terms, it applies to insurance contracts, which are generally one year contracts, entered into after January 1, 2004. The insurance provision of the declaration adopts the amendment to section 718.111(11), Florida Statutes, so there is no constitutional infirmity in its application to article VIII of the declaration. It is the repair obligation under article IX of the declaration that calls for unit owners, not the association, to pay for the cost of repairing the structural components of the units without unit owners being able to insure these structural components. If the amendment reassigns responsibility for disbursing the insurance proceeds to cover damaged units between the association and unit owners under the declaration, then the question of whether the statute as amended impairs rights and obligations under the existing declaration arises. See art. I, § 10, Fla. Const. ("no . . . law impairing the obligation of contracts shall be passed"); Pomponio v. Claridge of Pompano Condo., Inc., 378 So. 2d 774, 780 (Fla. 1979) (adopting a balancing test "to determine whether the nature and extent of the impairment is constitutionally tolerable in light of the importance of the state's objectives or is unreasonably" intrusive).

37. Generally, the Condominium Act governing a particular condominium is the law in effect on the date of recording the declaration of condominium. Sans Souci v. Dep't of Bus. Regulation, 421 So. 2d 623 (Fla. 1st DCA 1982); Suntide Condo. Ass'n v. Dep't of Bus. Regulation, 463 So. 2d 314, 317 (Fla. 1st DCA 1984). But see Rothfleisch v. Cantor, 534 So. 2d 823 (Fla. 4th DCA 1988) (limiting Suntide by holding that the 1985 act in effect at time of

board's action, not the 1983 statute in effect at time declaration was recorded, applies because no precedent could be set except for condominiums created in same year).

38. Plaza East did not amend article IX covering reconstruction and repair after a casualty and disbursements of insurance proceeds. However, the amendment to article VIII revises many of the responsibilities in this section, such as the replacement of the insurance trustee with the association as the party responsible for holding and disbursing the insurance proceeds. Further, to the extent that article IX might conflict with the insurance provisions of section 718.111(11), Florida Statutes (2003), the statute controls.

39. The question is whether the 2003 amendment applies to change the distribution of insurance proceeds and payment for the repair obligations under the declaration as recorded under the Condominium Act in 1963. In 1963, the Condominium Act required developers to include in a declaration provisions for insurance and reconstruction and repair after casualty. § 711.08(1)(l), Fla. Stat. (1963) (repealed ch. 76-222, § 3, Laws of Fla.). Plaza East and many other declarations of this period contain separate provisions for insurance and reconstruction. The present version of the law does not contain the reconstruction and repair requirement as separate from the insurance obligation. Ch. 76-222, § 1, at 417-19 (718.104 does not include insurance or reconstruction and repair provisions in declaration), § 1 at 423 (association authorized to obtain insurance), § 3 at 488 (repealing ch. 711, Fla. Stat.), Laws of Fla. (1976); §, 718.111(11) (2003) (repealing the grandfathering provision shifting the burden to

unit owners for replacing the wall and ceiling coverings “if the unit owner is required to repair or replace such equipment”). The insurance provision “is intended to establish the property or casualty insuring responsibilities of the association and those of the individual unit owner and do not serve to broaden or extend the perils of coverage afforded by any insurance contract provided to the individual unit owner.” Id.

40. A statute is prospective in application and not applied retroactively to substantive rights and obligations unless the statute expressly states that it is to be applied retroactively, or it is unequivocally implied. Fleeman v. Case, 342 So. 2d 815 (Fla. 1976); Century Vill., Inc. v. Wellington Condo. Ass’n, 361 So. 2d 128, 132 (Fla. 1978). Courts consider questions of “fair notice, reasonable reliance, and settled expectations” in determining if a statute operates retrospectively. R.A.M. of So. Fla., Inc. v. WCI Communities, Inc., 869 So. 2d 1210, 1215 (Fla.2d DCA 2004), review denied, 895 So. 2d 406 (Fla. 2005). Statutes that impair vested rights, create new obligations, impose new duties, or attach new disabilities, on existing contracts operate retroactively. Id. at 1216.

41. A statute will be applied retroactively if it does not contravene a constitutional right, e.g. impair a vested contractual right. Century Vill. 361 So. 2d at 132. A vested right is an immediate fixed right of present or future enjoyment. Id. at 1218. Vested rights are not contingent, which are rights that come into existence based on an event or condition. Id. Vested rights are not expectant, which are rights based on the continued existence of a present condition. Id. (finding that statutory right to cure unlicensed status was not a vested right).

42. Under section 718.110(4), (8), and (13), Florida Statutes, unit owners have vested rights in the original declaration that involve: (1) the configuration and size of their unit; (2) their ownership share in the common expenses and surplus; (3) the appurtenances to the unit; (4) provisions regarding timesharing of units; and, now, (5) rights to lease. See Woodside Village Condo. Ass'n, Inc. v. Jahren, 806 So. 2d 452 (Fla. 2002); Gary A. Poliakoff and Karl M. Scheuerman, The Woodside Covenants, Fla. Bar J. 10, 15 (May 2003) (owners are on notice that amendments may change the provisions in the declaration without their consent, so only those statutory amendments requiring consent may be considered vested); § 718.110(13), Fla. Stat. (2004) (right to lease may not be amended). Association contracts with third parties contain vested rights that may not be impaired by statutory amendment. E.g., Fleeman, 342 So. 2d 818. The legislature made the insurance amendment prospective as to insurance contracts by applying them to contracts entered into after January 1, 2004. It made the insurance amendment retroactive to all declarations. § 718.111(11), Fla. Stat. (2003) ("In order to protect the safety, health, and welfare of the people of the State of Florida and to ensure consistency in the provision of insurance coverage to condominiums and their unit owners, paragraphs (b) and (c) are deemed to apply to every condominium in the state, regardless of the date of its declaration of condominium.").

43. Statutes that are remedial or procedural and that do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of already existing rights, do not come within the legal concept of a

retroactive law or the general rule against retroactive operation of a statute. City of Lakeland v. Catinella, 129 So. 2d 133, 136 (Fla. 1961); City of Orlando v. Desjardins, 493 So. 2d 1027 (Fla. 1986); Young v. Altenhaus, 472 So. 2d 1152 (Fla. 1985); Ziccardi v. Strother, 570 So. 2d 1319 (Fla. 2d DCA 1990).

Legislative amendments that clarify existing law are generally not considered a retroactive application of the law because they explain the intent of the law as it was originally enacted. Palma Del Mar Condo. Ass'n #5 of St. Petersburg, Inc. v. Commercial Laundries of W. Fla., Inc., 586 So. 2d 315 (Fla. 1991).

A. Section 718.111(11), Florida Statutes (2003), applies retroactively.

44. The legislature stated an express intention for this provision of the Condominium Act to apply retroactively, which intention is made even clearer by removing the grandfathering provision. Section 718.111, Florida Statutes (2003), expressly states that “paragraphs (b) and (c) are deemed to apply to every condominium in the state, regardless of the date of its declaration of condominium.”

B. The amendment to section 718.111(11), Florida Statutes, clarifies the insurance responsibilities.

45. The statutory amendment clarified the insurance responsibilities of associations and unit owners. It clarified that deductibles in insurance premiums were permitted under the act as a cost of insurance. See supra ¶ 21.

46. Insurance costs, premium deductibles, and insurance proceeds have always been common expenses and common surpluses of the association. See Providence Sq. Ass'n, Inc. v. Biancardi, 507 So. 2d 1366 (Fla. 1987)

(reforming declaration to disburse common surplus insurance proceeds in same percentage share as ownership of common elements); see supra § IV.

Associations hold insurance proceeds in trust for the benefit of the unit owners and their mortgagees. National Title Ins. Co. v. Lakeshore 1 Condominium Ass'n, Inc., 691 So. 2d 1104 (Fla. 3d DCA 1997). An association's misuse of the insurance proceeds in failing to repair damages after a casualty is actionable. Id. (holding that mortgagee had a cause of action in association's negligent disbursement of funds by not completing the reconstruction of units after Hurricane Andrew).

C. Insurance provisions do not create vested rights.

47. Section 718.111(11), Florida Statutes, has always provided that a unit owner controlled association should make its best effort to insure the condominium property, but has never imposed an absolute requirement to do so. The obligation to insure portions of the condominium property has always rested with the association and the unit owners as their obligations appear in the declaration. These insurance provisions may be amended under the general amendment provisions in the declaration without mortgagee approval even if the declaration requires mortgagee approval. § 718.111(11)(b), Fla. Stat. (right to amend without regard to mortgagee approval); see Woodside Village Condo. Ass'n, Inc. v. Jahren, 806 So. 2d 452 (Fla. 2002) (unit owners may amend declaration to impose leasing restrictions as these are not within the restricted category of amendments requiring a unanimous vote under § 718.110(4), Fla. Stat.). The obligation to insure the condominium property creates an expectation

that the association will be able to contract for insurance in each succeeding year and a contingent obligation based on the association finding an insurer willing to insure the condominium property at a cost the association finds reasonable. The obligation to insure certain components of the property is, therefore, not a fixed, right of present or future enjoyment and does not create new obligations or liabilities. However, the general obligation to insure the property still exists and is an enforceable right, as opposed to an obligation to insure certain components of the property, which may change with amendments to the declaration and the laws governing condominiums and insurance. See Munder v. Circle One Condo. Ass'n, Inc., 596 So. 2d 144 (Fla. 4th DCA 1992) (finding corporate developer failed its obligation to insure clubhouse lost by fire, but directors did not breach their fiduciary duty so were not individually liable, which was superseded by amendment to § 718.111(11)(a), Fla. Stat., which makes it a breach of fiduciary duty for a developer to fail to adequately insure condominium).

48. Even if an association was obligated under a declaration to insure the carpets within the units, it cannot do so under the present law. Carpets and other floor coverings are the responsibility of the unit owner under the present law. Unit owners can no longer insure the interior walls, sliding glass balcony doors and other parts of the structure as these were originally installed. So, even if the amendment were found to be a vested right that could not apply retroactively, the association and unit owners would be unable to contract for insurance under these older declarations. The declaration provision would be impossible to perform.

D. Because condominiums and insurance are highly regulated, the amendment would apply retroactively even if substantive rights were affected.

49. Substantial regulation of the area by the state reduces the likelihood that a substantial impairment will be found. United States Fidelity and Guaranty Co. v. Dep't of Ins., 453 So. 2d 1355, 1360 (Fla. 1984) (holding that law requiring insurers to refund excess profits was not an unconstitutional impairment of contracts); Woodside, 806 at 455-56 (noting that condominiums are creatures of statute and highly regulated). Unit owners purchased condominiums knowing that both condominiums and insurance were highly regulated areas and subject to legislative changes. To require the association to maintain the enforceability of the declaration insurance provisions, including the disbursement of proceeds under the cost shifting provisions of reconstruction and repair after casualty, even when such coverage is no longer available from any insurer, would work too great a hardship on the owners. A declaration with outdated provisions that can no longer be enforced because the law has changed or market forces have changed making it impossible to perform should not control the outcome. See Rothfleisch v. Cantor, 534 So. 2d 823 (Fla. 4th DCA 1988).

E. The amendment serves a legitimate public purpose of encouraging lower, stable insurance premiums for condominium associations.

50. Once a legitimate public purpose has been identified, a determination is made as to whether the public purpose has been reasonably served by the adjustment made to the rights and responsibilities of the parties. U.S. Fidelity and Guaranty, 453 So. 2d at 1361. Courts will defer to the

legislature's judgment as to the necessity and reasonableness of the amendment. Id. If the impairment of the declaration reconstruction provision is considered substantial, then the legislature has stated the significant public purpose being served by the amendment. The legislature has provided that the insurance provisions are to protect the health, safety and welfare of Florida citizens, so the amendment is to apply to every condominium in the state regardless of the date of the declaration. The legislature recognized the need to stabilize and lower insurance premiums, especially for condominium associations and unit owners. According to the Office of Insurance Report, the "market ... appears stable, as evidenced by . . .modest increases in the rate." Condo. Ins. Rpt. at 13. The legislature intended for the provisions to retroactively apply to declarations and to prospectively apply to all insurance contracts entered into after January 1, 2004.

F. Plaza East may not shift the cost of association insurance to individual unit owners.

51. Plaza East may argue that even if the 2003 amendment applies, it may properly shift the cost of the repairs to unit owners under article IX of the declaration. Under the grandfathering provision that was repealed, an association that did not have sufficient insurance proceeds to repair unit damages might look to the general repair provisions of the declaration to shift the cost to unit owners where the unit owners were required to maintain and repair these items, such as electrical fixtures or heating equipment. See ch. 2003-14, § 4, Laws of Fla. ("if the unit owner is required to repair or replace such

equipment"). The statutory amendment, which repealed a unit owner's repair obligation, overrides the declaration.

VI. Conclusion.

52. The 2003 amendment to section 718.111(11), Florida Statutes, permits associations to include a reasonable deductible, which is a common expense, in hazard insurance contracts. It does not permit associations to shift the cost of paying the deductible, even when no claim is made because the amount of insured damages is less than the deductible, or the cost of repairing the association's insurable damages up to the deductible amount, to individual unit owners.

ORDER

Based upon the findings of fact and conclusions of law, it is declared that under section 718.111(11), Florida Statutes (2003), Plaza East Association, Inc., which is required to insure the condominium property located outside the units, the property located inside the units as initially installed, and all portions of the condominium property requiring coverage by the association under section 718.111(11)(a), Florida Statutes (2003), may not pass on to a single owner or a group of owners or less than all unit owners the cost of repairing those items that would have otherwise been paid for by the association's insurance policy but for the application of the deductible or amounts in excess of the coverage limits, notwithstanding provisions in the declaration shifting this responsibility to a unit owner.

DONE and ORDERED this 13 day of January, 2006,
at Tallahassee, Leon County, Florida.




MICHAEL T. COCHRAN, Director
Department of Business and
Professional Regulation
Division of Florida Land Sales, Condominiums,
and Mobile Homes
Northwood Centre
1940 North Monroe Street
Tallahassee, Florida 32399-1030

NOTICE OF RIGHT TO APPEAL

THIS FINAL ORDER CONSTITUTES FINAL AGENCY ACTION AND
MAY BE APPEALED BY PETITIONER PURSUANT TO SECTION 120.68,
FLORIDA STATUTES, AND RULE 9.110, FLORIDA RULES OF APPELLATE
PROCEDURE BY FILING A NOTICE OF APPEAL CONFORMING TO THE
REQUIREMENTS OF RULE 9.110(c), FLORIDA RULES OF APPELLATE
PROCEDURE BOTH WITH THE APPROPRIATE DISTRICT COURT OF
APPEAL ACCOMPANIED BY APPROPRIATE FILING FEES AND WITH THE
AGENCY CLERK, 1940 NORTH MONROE STREET, NORTHWOOD CENTRE,
TALLAHASSEE, FLORIDA 32399-2217 WITHIN THIRTY (30) DAYS OF THE
RENDITION OF THIS FINAL ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Jonathon S. Miller, Randall K. Roger & Associates, P.A., One Park Place, 621 NW 53rd Street, Suite 300, Boca Raton, Florida 33487, this 24th day of January, 2006.

Robin McDaniel
ROBIN MCDANIEL, Division Clerk

Copies furnished to:
Janis Sue Richardson,
Chief Assistant General Counsel